Local Union No. 287, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO[1] (Consolidated Freightways, Inc.) *and* Earl Averette. Case 32–CB–3256

October 18, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On March 14, 1990, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions, to modify the remedy,[3] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Local Union No. 287, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL–CIO, San Jose, California, its officers, agents, and representatives, shall take the action set forth in the Order.

[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] Interest will be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Barbara D. Davison, for the General Counsel.
Joseph R. Colton (Beeson, Tayer, Silbert, Bodine & Livingston), for the Respondent.
Margaret Jacobsen, for the Employer.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO Administrative Law Judge. The hearing in this case, held on December 15, 1989, is based on an unfair labor practice charge filed on July 12, 1989, by Earl Averette (Averette) and a complaint issued on August 24, 1989, on behalf of the General Counsel of the National Labor Relations Board (the Board), by the Regional Director of the Board, Region 32, alleging that Teamsters Local Union No. 287 (the Respondent) has engaged in unfair labor practices within the meaning of Section 8(b)(2) and 1(A) of the National Labor Relations Act (the Act). The complaint alleges that Respondent violated the Act by engaging in the following conduct: On or about April 3, 1989, at the Respondent's request, Consolidated Freightways, Inc. (the Employer) and the Respondent entered into and thereafter maintained an agreement or understanding whereby the Employer, when the Respondent's hiring hall was closed, agreed to hire and employ only those casual employees whose names appeared on a list provided to the Employer by Respondent, and that Respondent omitted Averette's name from the list for arbitrary and invidious reasons, including Averette's race and/or his perceived involvement in an internal political dispute among Respondent's members. Respondent filed an answer denying the commission of the alleged unfair labor practices.[1]

On the entire record, from my observation of the demeanor of the witnesses, and having considered the parties' posthearing briefs, I make the following

FINDINGS OF FACT

I. ALLEGED UNFAIR LABOR PRACTICES

A. *The Evidence*

The Employer is in the business of intrastate and interstate transportation of goods and materials by truck. The Employer's facility involved in this case is its San Jose, California terminal. Respondent represents the truckdrivers and dockworkers employed there. The Respondent and Employer are parties to a collective-bargaining agreement which governs their terms and conditions of employment. The agreement was in effect at all times material to this case.

In addition to its regularly employed dockworkers, the Employer employs workers on a casual basis to do dock work at its San Jose terminal. The casual dockworkers are represented by the Respondent and their terms and conditions of employment are set by the aforesaid bargaining agreement. Under the terms of that agreement the Employer is obligated to hire the employees represented by the Respondent, including its casual workers, exclusively through Respondent's hiring hall facility, with certain exceptions. One of the exceptions provides that the Employer may hire casuals from any source, if the need to employ them arises when the hiring hall is closed, or if casuals are not immediately available from the hiring hall.[2]

On the workshift which begins at 11 p.m. on Sunday and ends sometime on Monday morning or afternoon (the Sunday–Monday shift), the Employer usually needs casual dockworkers to supplement its regularly employed dockworkers, inasmuch as there usually is three or four times as many

[1] Respondent, in its answer, admits it is a labor organization within the meaning of Sec. 2(5) of the Act and that the Employer meets one of the Board's applicable discretionary jurisdictional standards and is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. I therefore find it will effectuate the policies of the Act for the Board to assert its jurisdiction.

[2] The governing contractual provision reads as follows: ''For casual employees who work on broken time or day to day basis for various employers, the Local Hiring Hall shall immediately supply such help to the Employer upon notice by the Employer that such casual employees are needed. In the event such casual help is not immediately available or the Local Hiring Hall is closed, the Employer may then hire such casual workers from any other available source.''

trucks to unload and/or reload on that shift as on any of the other shifts. Respondent's hiring hall is closed on Saturday and Sunday, therefore in order to submit its referral request to the hiring hall's dispatcher on Friday for the casual dockworkers it will need to work the Sunday–Monday shift, it is necessary for the Employer on the preceding Friday to estimate the amount of freight it will have for the Sunday–Monday shift. It is not until Sunday, however, that the Employer is able to determine exactly the amount of freight which will have to be handled by the workers on that shift. The Employer at this time quite often discovers it needs more casual dockworkers for the Sunday–Monday shift then had been requested on the previous Friday from Respondent's hiring hall. During David Hall's June 1988 to September 1989 tenure as an operations supervisor for the Employer, this situation occurred quite frequently. Hall, who was in charge of seeing to it that the Sunday–Monday shift was properly staffed, after learning on Sunday that he would need additional dockworkers to handle the freight expected for the Sunday–Monday shift, hired the extra dockworkers personally by telephone. In doing this he used a list of names which he had compiled. On the list were the names of persons who had been referred to the Employer in the past by Respondent's hiring hall and had been good workers, and the names of workers recommended to him by Respondent's regular employees. Prior to the time material, Respondent had not given the Employer a list of names to use when the Employer needed to hire casual dockworkers when the hiring hall was not open for business.

Respondent's business agent, Jerry Durham, is responsible for seeing to it that the Employer abides by the terms of its collective-bargaining contract with Respondent. During 1988 Durham was unhappy about Hall's above practice of hiring casual dockworkers directly, rather than using the Respondent's hiring hall to hire all the casuals used by the Employer on the Sunday–Monday shift. Durham suspected that Hall waited until Sunday to hire the additional dockworkers in order to circumvent the Employer's contractual obligation to hire casuals through the Respondent's hiring hall. Durham, as well as Respondent's president Robert Sandoval, also suspected that it was to avoid having to grant regular employment status to additional dockworkers, which prompted the Employer to hire so many casuals. Prior to the time material, President Sandoval, who was employed by Respondent as a truckdriver at its San Jose terminal and served as one of the Respondent's stewards at the terminal, asked Hall why the Employer hired so many casuals on Sunday for the Sunday–Monday workshift, rather than on Friday through the Respondent's hiring hall. Hall responded by explaining that it was not until Sunday, when the Respondent's hiring hall was closed, that the Employer by means of its computer determined the exact amount of freight tonnage which would be available for the Sunday–Monday workshift. Sandoval relayed this explanation to Durham, who accepted it.

During 1988 Durham was informed by the Respondent's hiring hall dispatcher that members of Respondent who were registered for work on the hiring hall's out-of-work register were complaining that the Employer had a practice of calling casuals directly for the Sunday–Monday workshift, rather than using the hiring hall. Durham telephoned the Employer's operation manager, Dan Sisneros, who, with Hall, was responsible for staffing the Sunday–Monday workshift, and relayed this complaint to him. Sisneros explained the reason why the Employer was hiring casuals directly rather than using the hiring hall and also complained to Durham that the Employer was unable to get a sufficient number of persons to do casual dock work on the Sunday–Monday shift from the hiring hall or from other sources. Durham accepted Sisneros' response and took no further action concerning the complaints of the hiring hall registrants.

Subsequently, in mid-January 1989,[3] Tom Blue assumed the position of Respondent's hiring hall dispatcher. Blue, within 1 or 2 weeks of assuming that position, told Durham that members of the Respondent who were registered for dock work on the hall's out-of-work register were complaining that the Employer was violating its contract with the Respondent by engaging in the practice of calling workers directly for Sunday–Monday shift casual dock work, rather than using the Respondent's hiring hall. On a number of different occasions, Blue relayed this complaint to Durham who, on each occasion, as he testified, responded: ''Until I had a member come to me and complain directly with direct evidence or some type of something to give me [an] indication that in fact [what] they were indicating was true, that I didn't at that point in time . . . have the luxury and the time to go out and find out what they were complaining about,'' but ''if a member came forward and indicated to me that in fact this was going on, that I would in fact investigate it.'' (Tr. 273–274.)

During the time material to this case–February, March, April–Respondent's officers and business agents were campaigning for reelection. A rerun election was scheduled for August or September. The position of secretary-treasurer is Respondent's most important office. David Haas was the incumbent in that position. Mario Gullo opposed him for reelection.[4] The candidates in the election divided themselves into two factions; one lead by Haas and the other by Gullo. Respondent's president Robert Sandoval and Bill Brooke, one of its business agents, were in the faction which supported Haas' reelection, whereas, Jerry Durham, one of Respondent's other business agents, was in the faction which supported Gullo's election. Haas was defeated by Gullo. Also Sandoval and Brooke lost in their bids for reelection, whereas Durham was reelected.

Earl Averette, the Charging Party, is an experienced dockworker in the truck freight industry and has been a member of various locals of the Teamsters Union for a period totaling approximately 20 years. Previously, in the 1960s, Averette was employed as a professional boxer, under the name of Marty Franklin. Socially he normally still uses the name of Marty Franklin, but in applying for work and in an employment context uses his legal name.

In February Averette, who had allowed his membership in Teamsters Local 150 to lapse while employed as a laborer in the construction industry, decided to again seek work as a teamster in the freight industry. He was advised by a friend that there might be work available out of Respondent's hiring hall. His friend told him to call Respondent's business agent Brooke. Averette telephoned Brooke. He introduced himself as Marty Franklin, informed Brooke that he was a black man and described his past work experience in the

[3] All dates hereinafter, unless specified otherwise, refer to 1989.

[4] Gullo previously was Respondent's secretary-treasurer. He had recently been unseated by Haas.

freight industry, and noted that it was his understanding that two blacks had recently been referred to jobs by Respondent's hiring hall, and asked if Respondent had any work for him in either the freight industry or in any other industry. Brooke suggested that he join the Respondent and sign up for work at Respondent's hiring hall, and stated that when he came to Respondent's office that he should be sure to visit him.

On February 14 Averette visited Respondent's office and filled out a membership application form. His application was not processed on that date because the clerical who handled the transaction wanted to determine whether, in view of Averette's current membership in Teamsters Local 150, he would be able to join Respondent without paying the usual initiation fee. However, the clerical was unable to contact anyone in Local 150's office because it had already closed for the day, so he told Averette to return the next day and that at that time his membership application would be processed.[5]

Before leaving Respondent's office on February 14, Averette talked with Business Agent Brooke and informed him he had applied for membership but would have to return to the office the next day to complete the application process and join. During the conversation which followed, Brooke invited Averette to accompany him across the street to a bowling alley cocktail lounge where he stated he would introduce him to some of the Respondent's members, and also invited him to attend the Respondent's monthly membership meeting which was scheduled for that evening. Averette accepted these invitations.

While with Brooke in the bowling alley cocktail lounge that day, Averette was introduced by Brooke to several of Respondent's members, including Respondent's president Robert Sandoval, who as indicated supra, was also employed as a truckdriver by the Employer. Brooke introduced him to the members as Marty Franklin and some of them remarked that they remembered him from his days as a boxer. Averette, after being introduced to Sandoval, informed Sandoval he was interested in finding work in the freight industry, that he had worked in that industry for approximately 20 years and needed only 9 more years of employment for his pension. Sandoval indicated there was not much work available at Respondent's hiring hall, but remarked that the Respondent was frequently unable to furnish the Employer with all the casuals it needed and suggested that Averette give Sandoval his name and telephone number and Sandoval would submit that information to the Employer's graveyard shift supervisor and if the Employer needed casual help perhaps the Employer would contact him. Also during this conversation Sandoval invited Averette to attend the membership meeting scheduled to be held that evening, as Sandoval's guest, in view of the fact that Averette was a member of another Teamsters local union. Sandoval suggested to Averette that when he went to the meeting that he should stand behind the sergeant at arms at the entrance to the meeting room and in this way the sergeant at arms would be able to introduce him to other members as they entered.

That evening when Averette entered the Respondent's meeting hall, rather than take a seat, he followed Sandoval's suggestion and stood at the entrance next to or behind the sergeant at arms, so he could meet some of the members as they entered. While Averette was at the entrance, Mario Gullo, Respondent's former secretary-treasurer, entered and as he did he said something to the sergeant at arms which caused the sergeant at arms to lose his temper and led to an argument between Gullo and the sergeant at arms, with the sergeant at arms pushing or shoving Gullo. Others in the hall joined in this confrontation and the result was that a substantial number of persons began to shout, push, and shove one another. Respondent's president Sandoval, after unsuccessfully attempting to bring the meeting to order, adjourned it and the police were summoned to restore order.

During the above-described commotion Averette, who was standing with the sergeant at arms, intermittently turned the lights in the room on and off and joined the others in their shouting, but did not push or shove anyone. Immediately after this commotion had begun, Business Agent Durham entered the hall and was informed by one of the members that the commotion had started when Respondent's former secretary-treasurer Gullo said something to the sergeant at arms which angered the sergeant at arms and resulted in an argument. In view of this explanation, Durham concluded that the commotion which had disrupted the meeting involved a political dispute. Durham at this point in time observed Averette, who was standing near the sergeant at arms, flipping the lights off and on and shouting. Durham assumed that since Averette was standing near the sergeant at arms that he was a part of the sergeant at arms' staff. Since he had never met Averette and did not know who he was, Durham went over to him and angrily asked who he was and whether he was a member of Respondent. Averette, using an obscenity, told Durham it was none of his business and to get out of his face and stated that if Durham objected to his presence that he should speak to President Sandoval because he was there as Sandoval's guest.[6] Durham did not reply and walked away.[7]

On February 15 Sandoval gave his supervisor, Operations Supervisor Hall, Averette's name and telephone number and indicated that Averette was available if the Employer ever needed additional casual dockworkers.[8] Subsequently, from time to time, during February and March, Sandoval mentioned to Hall and Operations Manager Dan Sisneros, that if they had additional work for casual dockworkers on the Sunday–Monday shift to be sure to call either Averette or Blake

[5] That Averette visited Respondent's office and applied for membership on February 14, rather than on some other date, is established by the fact that his membership application is dated February 14 and that the Respondent's membership meeting, which he attended on the same day as he visited Respondent's office, was held February 14.

[6] Durham and Averette had never been introduced and at this time did not know one another. They were formally introduced for the first time on April 3, when, as described infra, they met in Secretary-Treasurer Haas' office.

[7] The above description of what occurred at the February 14 meeting is based on a composite of the testimony of the three witnesses who testified about this meeting: Averette, Durham, and Sandoval. I note that Averette did not contradict Durham's testimony that Averette flipped the lights off and on during the commotion and, insofar as Averette's rebuttal testimony can be construed as a denial that he was shouting during the commotion, I credit Durham's testimony that he observed Averette shouting. Durham's and Averette's testimony concerning this meeting was perfectly consistent in all other significant respects.

[8] As indicated supra, besides being Respondent's president, Sandoval was employed as a truckdriver on the night shift at the Employer's terminal and was one of Respondent's job stewards.

Downing, whose name Sandoval had apparently also previously given to Hall.

On March 13 Averette returned to Respondent's office to complete the process of joining Respondent. Previously, by memo dated February 15, Respondent was informed by Teamsters Local 150's secretary-treasurer, that Averette was currently a member of that union, but having not paid his dues was not a member in good standing, thus before Local 150 could issue him a transfer card he would have to pay a reinstatement fee and the back dues owed to the union. On the same date Respondent also received a memo dated February 15 from one of the Local 150's clericals which stated: ''Thought I better send a memo on Earl Averette. He also has a termination notice that had to be sent to his last employer Transcon due to his check being returned. He has been a real problem and would recommend you collect cash. . . . He has worked for months without paying his dues here—Keeps leaving every time he gets a termination notice. Good Luck.''

On March 13 Averette indicated to the office clerical, who previously had processed his February 14 membership application, that he was ready to join Respondent. The clerical responded by stating that Respondent would not accept a check from him, that he would have to pay the required initiation fee and dues with cash because Respondent had been informed by Local 150 that a check Averette had given that union had bounced. Averette asked how much he would have to pay and was advised he was required to pay one-half the initiation fee and 1 month's dues. He paid that amount and became a member of Respondent.

On March 13, after joining Respondent, Averette went next door to the Respondent's hiring hall and registered for work using his legal name, but verbally introduced himself to Tom Blue, the hiring hall dispatcher, as Marty Franklin.[9] Blue told Averette he had heard about the problems which had occurred at the February 14 membership meeting and explained to Averette that there was currently a fight going on between the supporters of two rival groups of candidates seeking to fill positions in Respondent. Blue stated he opposed the reelection of President Sandoval and Business Agent Brooke and criticized Sandoval's performance as president. Blue also explained to Averette that the supporters of the candidates who were campaigning to defeat Sandoval and Brooke thought that Averette had joined Respondent ''to be enforcer for Bill Brooke's group,'' because they had heard Averette ask to speak to Brooke on February 14 when Averette visited Respondent's office. Blue also pointed to an official Board document posted on the hiring hall bulletin board and commented ''this is your buddy Bill Brooke's work.'' Averette responded by stating he was not on anyone's side, that he had not joined Respondent to be an enforcer, that he had been a member of the Teamsters Union for over 20 years and had joined Respondent in order to seek employment, and was not there to ''hassle'' anyone.

On Saturday, March 18, Averette telephoned Brooke and told him he had joined Respondent but did not know if it was worth all of the trouble trying to get work in San Jose and told Brooke about his March 13 conversation with Respondent's dispatcher Blue. Brooke stated that Averette should be careful of what he stated when Blue was present because Blue was ''with the other group.'' Brooke also informed Averette that the Employer might need him for the Sunday–Monday shift that weekend and, if so, would telephone him on Sunday at home.[10]

On Sunday, March 19, Averette received a telephone call at approximately noontime from a representative of the Employer asking him to report for work as a dockworker that evening to work the Sunday–Monday shift. He reported, as requested, and worked from 11 p.m. Sunday, March 19, to approximately 2:30 p.m. Monday, March 20. On the following two Sundays, March 26 and April 2, Averette was informed by Operations Supervisor Hall that the Employer had dock work available for him on the Sunday–Monday shift. On each of those occasions, as requested, Averette worked for the Employer on the Sunday–Monday shift performing dock work. On the three occasions he worked for the Employer—March 19–20, March 26–27, and April 2–3—Averette used his legal name.

On March 21 at approximately 4 a.m., shortly after Sandoval arrived for work at the Employer's terminal, Sandoval spoke to Averette and told him he had heard he was doing a good job for the Employer, but had also heard that Business Representative Durham was questioning people about his employment with the Employer and asking how he had gotten work with the Employer. Sandoval assured Averette that he had nothing to worry about because his employment was on the ''up and up''; that he had joined Respondent, and the Employer had called him during the weekends.

During the following week—the week ending Friday, March 31—Business Agent Durham, who was the business agent assigned by Respondent to administer all the Respondent's freight contracts including the contract with the Employer, personally spoke to Sandoval about Averette's employment. Their conversation took place one afternoon when Sandoval was at Respondent's office on business and Durham asked him to come into his office because he wanted to talk to him. In response to Durham's inquiry about Averette's employment with the Employer, Sandoval stated the Employer was employing Averette on a casual basis when it needed extra help, and that Averette was a good worker. Durham stated he thought the Employer should not employ Averette. Sandoval asked, ''Isn't he a member of our local union now.'' Durham acknowledged Averette had recently joined Respondent, but handed Sandoval a February 15 memo to Respondent from Teamsters Local 150, the local union which Averette had previously been a member of. This memo, as described in detail supra, informed Respondent that Averette while a member of Local 150 had worked for several months without paying his union dues and that each time Local 150 sent his employer a notice to terminate him for nonpayment of dues, that he left his employment and in one instance had given a dues payment check to the union which bounced due to a lack of funds. The memo further stated that Averette ''has been a real problem and would rec-

[9] Although he registered for work, Averette never returned to the hall to seek work, as required by the hall's rules and regulations, because he already was working during the week when the hiring hall was open.

[10] The description of Averette's March 18 conversation with Brooke is based on Averette's testimony. Brooke testified that while he had several phone conversations with Averette during this period, he did not ''recall'' this one or a conversation with Averette in which Blue's name was mentioned. I credited Averette's testimony because when he testified about this conversation his testimonial demeanor was good.

ommend you collect cash.'' When Sandoval finished reading the memo, Durham told him ''this is not the type of person we want in our local union.'' Sandoval answered, ''members are members'' and stated that people changed and that Averette was a qualified worker whose work performance for the Employer had been good. Durham responded by handing Sandoval a typed list of 21 members of Respondent and their telephone numbers. The list of names and telephone numbers was on an undated and unsigned sheet of Respondent's stationery and was entitled ''NIGHT DOCK WORK (WHEN HALL IS CLOSED).'' The list did not include Averette's name nor the name of Blake Downing, another member of Respondent whom at Sandoval's suggestion the Employer had been hiring to do casual dock work when it needed extra workers when the Respondent's hiring hall was closed. As he handed the list to Sandoval, Durham stated, ''These are the people that . . . should be called at [the Employer] if they need additional people after the hall is closed.'' Sandoval asked why neither Averette's nor Downing's name was listed. Durham answered, ''They don't have seniority.'' Sandoval told him that seniority should not have any bearing on the matter. Durham responded by stating, ''well, this is the list'' and asked if Sandoval would take it to the Employer's Operations Supervisor Dan Sisneros. Sandoval agreed to do this and that same afternoon, as described infra, gave the list to Sisneros.

The substance of Durham's above-described conversation with Sandoval is based on Sandoval's testimony. I considered Durham's testimony that when he met with Sandoval and gave him the list of names and telephone numbers to take to Operations Manager Sisneros, that he explained to Sandoval that the reason for the list was that he had received numerous complaints from persons registered for work at the Respondent's hiring hall that the Employer ''was not properly staffing the crew prior to this Sunday night–Monday morning shifts, and that [the] list had been put together by members of the hiring hall that wished to be on the list, for them to be called at home when the hall is closed,'' and considered his further testimony that he told Sandoval to give the list to Sisneros ''so [Sisneros] could utilize [it], if in fact he needed additional people.'' Durham did not specifically deny that portion of Sandoval's testimony which concerned the discussion between Durham and Sandoval about Averette's employment with the Employer and his membership in Respondent. However, if the conversation between Durham and Sandoval occurred in late February, as Durham testified, Sandoval's version would have been inherently implausible because it was not until much later that Averette joined Respondent and was first hired by the Employer. I reject Durham's and credit Sandoval's testimony about what was said when they met because Durham's testimonial demeanor was poor and Sandoval's was good, when they testified about their conversation during this meeting.[11]

I also conclude it was sometime during the week ending March 31 when Durham met with Sandoval, as described supra, and gave him the list of names and telephone numbers to give to the Employer. In rejecting Durham's testimony that it was late in February, after February 25, when he met with Sandoval and gave him the list of names to give to the Employer, and in concluding that this meeting occurred during the week ending Friday, March 31, I considered the following circumstances: although Sandoval had no independent recollection of when his meeting with Durham occurred (Tr. 178), it is clear from the content of their conversation that it occurred sometime in March, after Averette had joined the Respondent on March 13 and after he was hired by the Employer to work the Sunday–Monday shift on March 19–20; Durham's testimonial demeanor was poor when he testified it was late in February when he met with Sandoval and gave him the list of names to give to the Employer; Sandoval gave the list of the names to the Employer the same afternoon that Durham asked him to do this; David Hall, the Employer's supervisor responsible for hiring employees for night dock work when the hiring hall is closed, as I have found infra, credibly testified that it was on April 2 when he first received the list of names and telephone numbers that Durham had instructed Sandoval to transmit to the Employer; and, as I have found infra, Respondent's Terminal Manager John Paiva credibly testified that on the morning of Monday, April 3, Durham informed him that the aforesaid list of names had been provided to the Employer by Respondent during the previous week (Tr. p. 246, L. 20–p. 247, L. 12). These considerations in their totality warrant the inference that it was sometime during the week ending Friday, March 31, that Durham spoke with Sandoval and gave him the list of names and telephone numbers to give to the Employer.

As I have found supra, when Durham met with Sandoval during the week ending Friday, March 31, and asked him to transmit the above-described list of names and telephone numbers to Operations Manager Sisneros, on the same day Sandoval personally handed the list to Sisneros. He explained to Sisneros that Durham had given him the list and had stated that if the Employer needed to employ more workers than had been dispatched to the Employer from the Respondent's hiring hall, that the persons on the list which Sandoval had given to Sisneros ''were the only people that could be used additional.'' Sisneros replied, ''if that's what the Union wants, that's what we will do'' and, in Sandoval's presence, photocopied several copies of the list for other members of supervision and gave Sandoval one of the copies.

On the night of Sunday, April 2, when Operations Supervisor Hall arrived for work, Hall, who was responsible for staffing the Sunday–Monday shift, found in his mailbox the above-described list of names and telephone numbers entitled ''NIGHT DOCK WORK (WHEN HALL IS CLOSED).'' When Sandoval arrived for work later during that shift, Hall asked him about the list. Sandoval informed him that at the Respondent's insistence the list had been given to Operations

[11] In resolving the conflict between Durham's and Sandoval's testimony, I considered and rejected the testimony of former Business Agent Bill Brooke and Business Agent Ray Corrie. Brooke and Corrie, whose offices are situated adjacent to Durham's, each testified that they overheard an isolated fragment of Durham's conversation with Sandoval. Counsel for the General Counsel contends that Brooke's testimony corroborates Sandoval's version of the conversation in one significant respect, and counsel for Respondent claims Corrie's testimony corroborates Durham's version in one significant respect, as well as Durham's testimony concerning the date of the conversation. It is undisputed that Brooke and Corrie were busy at work in their own offices during the time in question and were not paying particular attention to the conversation between Durham and Sandoval, but each supposedly just happened to hear one isolated fragment of the conversation, and in Corrie's case there is nothing in the record to explain why he would have remembered that fragment several months after the event. I am of the opinion that their testimony is unreliable.

Manager Sisneros and that the Employer was to use the list before calling any other persons.

On April 3 at approximately 8:30 a.m., Durham telephoned John Paiva, the Employer's terminal manager, and told him the Employer was employing three people, whom he did not name, on its graveyard shift and stated they were not ''active members'' of Respondent and there would be a grievance filed against the Employer because it had employed the three, rather than employees named on the list which had been given to the Employer the previous week. Durham explained to Paiva that the Employer was obligated to first employ persons named on the list which had been given to the Employer. He informed Paiva that it was his opinion that the Employer had violated the governing collective-bargaining contract by not ordering labor on Friday and stated that in filing its grievance against the Employer the Respondent intended to ask for a day's pay for three of Respondent's members who would have been referred from the Respondent's hiring hall to work on the graveyard shift, if on Friday of the previous week the Employer had used the hiring hall to meet its labor needs for that shift.[12]

Paiva, prior to his above-described April 3 conversation with Durham, never had seen nor heard of the list of employees that Durham had referred to, so he promptly spoke to Hall and questioned him about the matter. Hall showed Paiva the list. Paiva told Hall there was a problem with the Respondent concerning the list because the names of casual dockworkers Earl Averette, Gene Lopez, and Thornton Ohshaski were not on the list, yet they were employed on the Sunday–Monday shift. Paiva instructed Hall that the three were not to work ''unless they were called off this particular list.''[13]

Immediately before or after Paiva spoke to Hall about his conversation with Durham, he also spoke to Sandoval about the matter. He told Sandoval that Hall had advised him that casuals Averette, Lopez, and Ohshaski were good workers, and asked Sandoval if they were active members of Respondent. Sandoval stated that all three were members of Respondent. Paiva stated that he had been told by Durham that he could not employ them anymore since they were not active members. Sandoval replied by suggesting that Paiva at this time meet with the three casuals and explain the situation to them. Paiva agreed.[14]

On April 3, at approximately 9 a.m., Paiva, in the presence of Hall and Sandoval, met with Averette, Lopez and Ohshaski and told them that the Employer had a contract with the Respondent which it had to abide by and that the Respondent had instructed him not to employ them any longer. He explained to them that the reason there was a problem with their continued employment was that they were not ''on a prescribed list of people who were to be used on the dock'' and that in view of this the Respondent had asked for their termination. Paiva and Sandoval advised the employees that if they objected to the Employer's conduct that they should speak to Business Agent Durham. Paiva instructed Hall to terminate their employment immediately; sign their timecards out. All three employees objected to the way in which they were being treated and were especially incensed that they were being terminated in the middle of the workshift, with several hours of overtime work still remaining. Hall apologized to them but explained that the Employer was required to comply with the conditions for their employment set by Respondent. Averette indicated he was very upset about the matter and intended to file charges with the EEOC against Respondent.[15]

On April 3, late in the afternoon, Averette went to the Respondent's office and met with David Haas, the Respondent's secretary-treasurer. Averette told him that Durham had called the Employer and told the Employer not to employ Averette and two other casual dockworkers who had been working on the Sunday–Monday shift. Haas indicated he did not believe Durham would have engaged in such conduct and called Durham into the room. In Averette's presence, Haas asked Durham if he had instructed the Employer to remove Averette from the job and told the Employer it could no longer employ him. Durham denied having engaged in this conduct. However, in response to Haas' further inquiries, Durham admitted he had given the Employer a list of names to use when it needed extra casual workers. He explained that the list was put together by members of Respondent who were registered for work at the Respondent's hiring hall and that by signing the list they had indicated they were willing to be called at home when the hiring hall was closed, or when the hiring hall could not provide anyone to the Employer. Durham told Haas that the list had been given to Sandoval to transmit to the Employer. Averette objected to this, stating that such a list violated the hiring procedure set forth in Respondent's contract with the Employer and stated

[12] This description of Durham's conversation with Paiva is based on Paiva's testimony. Durham testified he told Paiva that members had complained to him that the Employer was not using people from the Respondent's hiring hall, and that Durham had visited the Employer's terminal that morning and discovered this was true, and told Paiva that in view of this a grievance would be filed for ''runaround pay'' on behalf of those members who had complained. Durham further testified he told Paiva he felt that by not calling the hiring hall for workers, that the Employer was purposely attempting to circumvent the hiring hall provisions of the parties' contract and that when Respondent had previously experienced this problem with the Employer, that as a courtesy to the Employer Sandoval had given the Employer's operations manager a list of names of the people who were willing to be called for work at home by the Employer and that Respondent had asked that whenever the Employer needed additional workers which the hiring hall was not able to supply, that it should use this list and that Durham felt the Employer was trying to circumvent the hiring hall by not using the list. I credited Paiva's and rejected Durham's testimony because Paiva's testimonial demeanor, which was good, was better than Durham's when they testified about this conversation.

[13] Later that day Paiva telephoned Durham and told him he was upset about the list because he felt that something of that nature should have been signed and dated and since he was the Employer's terminal manager that a change in policy of that kind should have been sent to him or handed to him personally, rather than just given to one of his subordinates. The record does not reveal what, if anything, Durham replied.

[14] This description of Sandoval's conversation with Paiva is based on a composite of their testimony.

[15] Averette, Hall, Paiva, and Sandoval testified about this meeting. The above-description is based on a composite of Hall's, Paiva's, and Sandoval's testimony. Their testimonial demeanor was good. I also note that Hall was a disinterested witness, inasmuch as he was no longer employed by the Employer when he testified in this proceeding, having terminated his employment several months prior to the hearing. I rejected Averette's testimony about the meeting, insofar as it deviates from the above description, because I received the impression from my observation of him and the manner in which he testified about this meeting, that his memory of what occurred at this meeting was poor. Finally, insofar as there is a conflict between Sandoval's and Hall's testimony concerning whether or not the employees were terminated in the middle of their workshift, I credited Hall's testimony because in view of his position as the employees' immediate supervisor, I am of the opinion he had a better reason than Sandoval to remember at what point during the workshift their employment was terminated.

it was illegal for the Respondent to require the Employer to hire workers from such a list. Durham denied that by transmitting the list to the Employer the Respondent was violating the contract. He stated it was the Employer that was violating the contract by intentionally not calling the hiring hall for sufficient casuals for the Sunday–Monday shift and by hiring casuals instead of regular workers to perform the dock work, and stated that a grievance was being filed by him against the Employer. The argument between Durham and Averette had become heated, when Haas interrupted it. He asked Durham, ''to resolve this, do you have anything against putting [Averette's] name on the list?'' Durham replied, ''no, I have nothing against getting his name on the list with the rest of the workers.'' Averette responded by indicating that although he did not agree with the list, he would be satisfied if his name was added to the list inasmuch as he felt that by having his name on the list it would enable him to continue working for the Employer and thus solve his problem. The meeting ended at this point with Durham and Averette shaking hands and apologizing to one another for having lost their tempers.[16]

On April 5 Durham filed a contractual grievance against the Employer on behalf of Joe Balteria, Curtis Philyaw, and Miller White. The grievance alleged in substance that on April 3 the Employer had violated the hiring procedure set forth in its contract with the Respondent and as a remedy for the Employer's alleged breach of contract asked that Balteria, Philyaw, and Miller be made whole for the wages and fringe benefit payments they lost by not being referred to the Sunday–Monday shift of April 2–3.

On or about April 5 Averette telephoned Hall and told him he had spoken to Haas and Durham and that everything had been resolved, that Durham should notify Hall to add his name to the list, and that Averette would call Hall Sunday to see if there was any work available.

It is undisputed that neither Durham nor anyone else from Respondent ever advised the Employer to add Averette's name to the list of employees nor did Respondent ever transmit a revised list of names to the Employer which included Averette's name.

On or about Friday, April 7, Sandoval asked Hall if he intended to employ Averette or any of the other casuals that had been employed on the April 2–3 Sunday–Monday shift. Hall replied, ''No, I'm not because I'm under instructions not to call no one else other than the people off this list,'' and indicated to Sandoval he was having difficulties getting people from the list to work as casuals (Tr. 153–154, 186).

On Sunday, April 9, Averette telephoned Hall and asked if there was work available for him. Hall told him that his name was not on the list. Averette stated Durham had promised to place his name on the list. Hall stated he was sorry but there was nothing he could do, and told Averette that if Averette was able to resolve the matter that Hall would reemploy him.

Previously on or about Friday, April 7, when Hall was talking with hiring hall dispatcher Blue over the telephone about his employment needs for the coming weekend, Blue told Hall that he did not have to use the list of names given to the Employer by Respondent. Blue explained to Hall that Respondent intended that the list be used by only those employers that continually employed employees who were not members of Respondent and that the Employer was not one of those employers. Hall replied he intended to continue to use the list of names until he officially received word from Durham to the contrary and stated if Blue wanted to discuss the matter further that he might prefer to discuss it with Terminal Manager Paiva, rather than Hall. Also at about this time, Blue apparently asked Hall to add a name to the list, because Hall communicated this information to Paiva.[17] Paiva telephoned Blue on April 10 and told him that, in view of the problem the Employer had the previous week, that the Employer would not add a name to the list unless it received authorization to do so in writing or received a revised list.

Subsequent to April 3, when calling the Respondent's hiring hall on Fridays to ask for referrals of casual dockworkers for the Sunday–Monday shift, the Employer adopted a practice of ordering more casuals than usual in order to avoid having any further problems with the Respondent concerning that subject (Tr. 260). But when subsequent to April 3 the Employer needed extra dockworkers when the Respondent's hiring hall was closed or when the hiring hall was unable to satisfy the Employer's needs, Hall used the list of names and telephone numbers furnished by Respondent. However, when he telephoned the persons named on the list he discovered that most of them could not be reached or told him they were unavailable for night shift work, and others on the list were ineligible to work for the Employer because the Employer, prior to April 3, had advised Respondent that it did not desire to employ those employees because of their past unsatisfactory work performance. Therefore, it was not unusual for Hall to exhaust the list of names which had been provided by the Respondent and still find he needed additional casual dockworkers for the Sunday–Monday shift. When this occurred he then used his own personal list of names and employed persons from that list as casuals, including Lopez and Ohshaski, and did this without objection from the Respondent. However he never called Averette for employment. He testified his reason for never calling Averette for employment when he exhausted the Respondent's list of names, subsequent to April 3, was that he had mislaid his telephone number.

In May Respondent's business agent Ray Corrie filed intraunion charges against Brooke and Sandoval alleging that they had allowed Averette into the February 14 membership meeting and that Averette had disrupted the meeting.

On July 12 Averette filed the charge in this case and on August 24 the complaint issued.

On August 29 a meeting was held between Paiva, for the Employer, and Corrie, Durham, and Sandoval, for the Respondent, concerning the above-described grievances filed against the Employer by Durham early in April on behalf of Respondent's members Balteria, Philyaw, and White. During the August 29 grievance meeting there was a brief discussion about the list of names and telephone numbers which Respondent had given to the Employer to use for calling casual dockworkers when the Respondent's hiring hall was closed. Durham, Corrie, Sandoval, and Paiva testified about this, as follows.

[16] The description of this meeting is based on a composite of Averette's and Durham's testimony. Their testimony about what was stated during this meeting was not inconsistent in any significant respect.

[17] The name which Blue asked to be added to the list was not Averette's.

Durham testified Paiva stated Sandoval had told the Employer that Durham had stated that the Employer could only employ the persons named on the list given the Employer by Respondent and further testified Paiva also stated that the list was not satisfactory and he did not intend to continue using it. Durham further testified that when Paiva made this statement that Durham responded by stating he had not told Sandoval that the Employer had to use the list and stated that Sandoval must have misunderstood Durham's instructions. In reply, according to Durham, Sandoval stated, ''Well maybe I did misunderstand you,'' and also stated that he ''thought that [Durham] had said that, but maybe not.''

Corrie testified that when Paiva stated he could only call the persons named on the list, Durham replied that this was not true and that the Employer was entitled to call other people. Corrie further testified Durham explained to Paiva that the list had been given to the Employer so it would have a list of persons to call who had indicated to Respondent they wanted to work and would be available for work, and that the Employer could call anyone it wanted and if the Employer did not want to use the list that it could forget about the list and not use it, but the Employer should call the Respondent's hiring hall when there was work available on weekends. Corrie further testified that Sandoval spoke up and stated that when Durham gave him the list to give to the Employer, he told Sandoval that the Employer had to call the persons named on the list. According to Corrie, in response to Sandoval's assertion, Corrie stated he had been present when Durham spoke to Sandoval about the list and that perhaps Sandoval misunderstood what Durham had said about the list, and that Sandoval replied, ''Well, I may have misunderstood but . . . that's what I thought.''

Sandoval testified that the only thing about the list that he recalls being mentioned at this meeting was that Paiva asked why Durham had not signed it, and Durham answered by stating he had nothing to do with the list, which he said had been generated by Respondent's hiring hall. Sandoval testified that no one stated the list was not a mandatory list, or used words to that effect, nor did anyone say that Sandoval had mistakenly told the Employer that it was required to use the list. Sandoval further testified he did not say that he might have made a mistake when he informed the Employer that Durham had stated the Employer had to use the list.

Paiva testified he told Durham the Employer had no success in using the list and asked Durham for a new list of names or a revised list of names. He testified he did not recall anyone saying that it was not mandatory for the Employer to use the list or that the Employer had the discretion to either use or not use the list. He testified that his best recollection was that those comments were not made.

I reject Durham's and Corrie's and credit Sandoval's and Paiva's testimony about the August 29 meeting and find that on August 29 Durham did not indicate to Paiva that the Employer was not obligated to use the list of names provided by Respondent, nor did he indicate to Paiva that Sandoval must have misunderstood what Durham had stated about the list, nor did Sandoval admit he might have misunderstood what Durham told him about the list. Rather, I find that when Paiva asked why Durham had not signed the list and indicated that the Employer was not having much success in using the list and asked Durham for a new list or a revised list, that Durham did not indicate the list was simply for the Employer to use or not to use as it saw fit, but stated he was not responsible for the list which he said had been generated by Respondent's hiring hall. I have credited Sandoval's and Paiva's testimony about this aspect of the meeting because their testimonial demeanor, which was good, was better than the testimonial demeanor of Durham and Corrie, which was not so good. It is because of this that I find that it was not until December 4 that Durham, shortly before the hearing in this case, by letter to Paiva, for the first time indicated to him that the Employer had misunderstood the purpose served by the list, and for the first time stated to Paiva that the Employer was not obligated to use the list. Durham's December 4 letter, reads as follows:

> Dear Mr. Paiva:
>
> It has been brought to my attention that there my [sic] be some misunderstanding as to the purpose served by the list provided to the company by Local 287 reflecting the names of individuals available to be called to work on weekends.
>
> In furnishing this list to the Company, the Union did not intend that only these individuals could be called to work at times when the Union's Hiring Hall is closed. Indeed Article 40, of the Agreement makes it clear that the Employer may obtain workers from any source when the Hall is closed.
>
> By furnishing the list, the Union simply was providing you with information regarding qualified workers who were willing to be called directly.
>
> Apparently the Company has represented to the National Labor Relations Board that it was instructed by the Union not to call an individual by the name of Earl Averette because his name was not on the list. The Union has not given any such instruction to the Company, nor does the Union intend that Mr. Averette not be called under circumstances set forth in Article 40, of the Agreement.
>
> To avoid any possible future misunderstandings, the Union hereby rescinds the list previously given the Company and confirms that the Company should follow the procedures set forth in the above referenced contractual provision. In doing so, however, the Union of course reserves the right to file a grievance if the Company calls an individual to work on a weekend when the Company knew, or should have known, of its need for a casual worker by the close of business on the preceding Friday. Under such circumstances, the contract clearly requires the Company to obtain workers from the Hiring Hall lists.

B. *Discussion*

The complaint alleges that on or about April 3 Respondent's business agent Jerry Durham requested that the Employer hire and employ only the casual employees whose names appeared on the list provided by the Respondent, and that Charging Party Averette's name was not among those listed. The complaint further alleges that the Employer agreed to comply with this request and that the parties subsequently maintained this agreement for an undetermined period of time. Lastly, the complaint, as clarified by counsel for the General Counsel during the hearing (Tr. 14–15, 403), alleges that Respondent engaged in the aforesaid conduct be-

cause of ''Averette's race and/or his perceived involvement in an internal political dispute among the membership of Respondent,'' and that by engaging in this conduct Respondent interfered with, restrained, and coerced Averette in the exercise of his statutory rights within the meaning of Section 8(b)(1)(A) of the Act and attempted to cause and caused the Employer to discriminate against him with respect to his employment within the meaning of Section 8(b)(2) of the Act. In her posthearing brief, however, counsel for the General Counsel states ''although the complaint specifically alleges race as one of the arbitrary and invidious reasons, there was no evidence adduced at the hearing in support of such an allegation and the General Counsel no longer contends that Respondent's actions were based upon Averette's race.'' I agree with counsel for the General Counsel's evaluation of the evidence. I therefore shall recommend the dismissal of the complaint insofar as it alleges Respondent engaged in its alleged misconduct because of Averette's race. The remainder of the complaint's unfair labor practice allegations are meritorious for the reasons below.

Late in March, at the request of Respondent's Business Agent Durham, the Employer agreed that when Respondent's hiring hall was closed the Employer would hire casual dockworkers from a list of persons and their phone numbers provided by Durham. In this regard, as described in detail supra, during the week ending March 31 Robert Sandoval, Respondent's president, and one of Respondent's stewards at the Employer's terminal, was instructed by Durham, the business agent responsible for administering Respondent's contract with the Employer, to give the Employer's Operations Manager Sisneros a list of 21 names and telephone numbers, entitled ''NIGHT DOCK WORK (WHEN HALL IS CLOSED).'' Durham told Sandoval that those were the persons the Employer should call if the Employer needed additional casual dockworkers when the Respondent's hiring hall was closed. Later the same day Sandoval, following Durham's instruction, gave the list to Sisneros and advised him that he had been instructed by Durham to give him the list. In explaining the purpose of the list to Sisneros, and later to Operations Supervisor Hall, Sandoval stated in effect that the Employer was expected to use the list before calling any other persons for casual dock work when the hiring hall was closed. Sisneros replied, ''If that's what the Union wants, that's what we will do.'' These circumstances reveal that during the last week in March the Employer, at Respondent's request, agreed that when the Respondent's hiring hall was closed that the Employer would hire casual dockworkers from the list of names and telephone numbers provided by Respondent.

The Employer and Respondent maintained and enforced their agreement that the Employer would use the Respondent's list of names and telephone numbers, when hiring casual dockworkers if the Respondent's hiring hall was closed. In this regard, as described in detail supra, on April 3, at Business Agent Durham's request, the Employer's Terminal Manager Paiva implemented the parties' agreement by discharging three casual workers employed on the Sunday–Monday shift and did this because their names were not included on the list of names provided by Respondent. Subsequently, whenever the Employer needed to hire casual dockworkers for the Sunday–Monday shift, when the Respondent's hiring hall was closed, the Employer's operation supervisor Hall used the list of names and telephone numbers provided by Respondent and only after Hall exhausted all of the names on the list did he then use his own personal list of names to contact persons for employment. It was not until Durham's December 4 letter to Paiva that Respondent informed the Employer the list had been rescinded and the Employer no longer had to use the list for hiring casual dockworkers when the hiring hall was closed. I have considered that previously, on April 7, Respondent's hiring hall dispatcher Blue informed Hall that the Employer did not have to use the list because it was Respondent's intent that the only employers who would have to use the list were those who continuously employed persons who were not members of Respondent, and the Employer did not fall into that class of employers. However, inasmuch as Business Agent Durham was responsible for administering the Employer's contract with Respondent and since it was Durham who initially instructed the Employer to use the list and was the person who, on April 3, complained to Terminal Manager Paiva that Respondent had not used the list, Hall told Blue that he intended to continue to use the list until the Employer received word officially from Durham that it was not obligated to do so. Not only did Durham fail to contact the Employer to confirm what Blue had stated to Hall, but on August 29, as described in detail, supra, when Paiva complained to Durham that the Employer was not having much success in using the list and asked for a new or revised list, Durham did not indicate to him that the Employer was not obligated to use the list. It was not until December 4, shortly before the hearing in this case, that Durham, by his letter to Paiva, specifically rescinded the list and abrogated the parties' agreement that the Employer would use the list to call casual dockworkers when the Respondent's hiring hall was closed.

In maintaining and enforcing the above-described agreement with the Employer the Respondent on April 3 caused the Employer to terminate Averette's employment.[18] As described in detail, supra, on the morning of Monday, April 3, Business Agent Durham telephoned Terminal Manager Paiva and told him that the Employer was currently employing three persons on its Sunday–Monday shift, one of whom was Averette, who were not active members of Respondent, and told Paiva that Respondent intended to file a grievance against the Employer for employing those three casuals instead of three of the persons named on the list which had been given to the Employer by Respondent the previous week, and explained to Paiva that the Employer was obligated to first employ the persons named on that list. On April 3 Paiva promptly discharged Averette, prior to the end of his workshift. Clearly, Respondent on April 3 caused the Employer to terminate Averette's employment and did so

[18] To find that a labor organization has unlawfully interfered with an employee's job status, it is sufficient if the employer's action is reasonably attributable to the union's conduct. In particular, the law is settled that ''an express demand or request is not essential to a violation of Sec. 8(b)(2) of the Act.'' *Northwestern Montana District Council of Carpenters (Glacier Park)*, 126 NLRB 889, 897 (1960). Rather, ''[i]t suffices if any pressure or inducement is used by the union to influence the employer.'' Ibid. See also *NLRB v. Jarka Corp.*, 198 F.2d 618, 624 (3d Cir. 1952) (''[T]he relationship of cause and effect, the essential feature of Sec. 8(b)(2) can exist as well where an inducing communication is in courteous terms or even predatory terms, as where it is rude and demanding.''); *Yellow Freight System*, 197 NLRB 979 (1972) (union caused discharge of nonmembers by calling to employer's attention that their employment violated employer's no-relatives rule).

pursuant to its enforcement of its above-described agreement with the Employer.

In maintaining and enforcing the above-described agreement with the Employer, the Respondent, subsequent to April 3, caused the Employer not to reemploy Averette. The Employer was extremely satisfied with his work performance on the Sunday–Monday workshifts on March 19–20, March 26–27, and April 2–3, and during the normal course of business would have continued to hire him for that workshift thereafter, if it needed extra casual dockworkers when the Respondent's hiring hall was closed. However, on Sunday, April 9, when Averette telephoned Operations Supervisor Hall and asked whether there was work available for him on the April 9 Sunday–Monday shift, Hall told him his name was not on the list provided to the Employer by Respondent and because of this Hall could not employ him, but informed Averette that if Averette resolved the matter of his not being on the list, that Hall would employ him. This circumstance plus what Durham stated to Terminal Manager Paiva on April 3, supra, make it perfectly clear that in maintaining and enforcing its above-described agreement with the Employer, Respondent caused the Employer not to reemploy Averette on the Sunday–Monday shift subsequent to the April 2–3 shift. In so concluding I considered that during the weeks which followed the April 9–10 Sunday–Monday shift, if Hall needed to hire casual dockworkers for that shift when the hiring hall was closed, he was on most of those occasions unable to fill his needs using the list provided by Respondent, so he frequently used his own personal list of names and did this without objection from Respondent. However, on those occasions he did not contact Averette to see whether he was available for employment because he had mislaid his telephone number. Respondent apparently contends that in view of this it cannot be said to have caused the Employer to have refused to reemploy Averette; that during the normal course of business, even absent Respondent's alleged unfair labor practices, the Employer would not have continued to employ Averette for the Sunday–Monday shift because it had lost his telephone number. I disagree. As described in detail, supra, it was Averette's practice to personally telephone Hall each Sunday to inquire about the availability of work on the Sunday–Monday shift, rather than to wait for a phone call from Hall. However, on Sunday, April 9, when Averette phoned Hall to inquire about work and was told there was no work available for him because his name was not on the list provided by Respondent, Averette ceased calling Hall to inquire about the availability of work.[19] In other words, but for Respondent's alleged unfair labor practices Averette would have most likely continued to follow his usual practice of calling Hall on Sunday to inquire about the availability of work on the Sunday–Monday shift, thus he would have continued to secure employment even though Hall had mislaid his telephone number.

Having found that during the last week in March, at the request of Respondent's Business Agent Durham, the Employer agreed to use a list of names and telephone numbers provided by Durham if it needed to employ extra casual dockworkers when Respondent's hiring hall was closed, and having further found that this list did not include Averette's name, and having found that pursuant to the aforesaid agreement, that the Respondent caused the Employer to terminate Averette's employment on April 3 and to subsequently fail and refuse to continue to employ him on the Employer's Sunday–Monday shift, the remaining question is whether Respondent's motive for engaging in this conduct was to cause the Employer to cease employing Averette because, as contended by counsel for the General Counsel, Respondent's business agent Durham believed Averette was supporting candidates, whom Durham opposed, in an intraunion election being conducted by Respondent. If so, as contended by the General Counsel, Respondent violated Section 8(b)(1)(A) and (2) of the Act because an employee's involvement in intraunion politics is protected by Section 7 of the Act. For the reasons below, I am persuaded that Respondent's above-described conduct was discriminatorily motivated.[20]

I am persuaded that in securing the Employer's agreement to use the list of names and telephone numbers provided by Business Agent Durham, if the Employer needed to employ extra casual dockworkers when the Respondent's hiring hall was closed, and in causing the Employer to terminate and cease employing Averette pursuant to that agreement, the Respondent was motivated by Business Agent Durham's belief that Averette was supporting candidates, whose reelection Durham opposed, in an intraunion election being conducted by Respondent. The following factors, viewed in their totality, support this inference.

As described in detail supra, during the time material Respondent's members were involved in an election campaign concerning the election of Respondent's officers and business agents. Secretary-Treasurer Haas, President Sandoval, and Business Agent Brooke supported one another in their bids for reelection, whereas Business Agent Durham supported former Secretary-Treasurer Gullo and the candidates he backed.

Durham believed Averette had joined Respondent with the intention of actively supporting Sandoval, Brooke, and Haas in their bids for reelection. In this regard, as described in detail supra, when Durham arrived at Respondent's February 14 monthly membership meeting, in the midst of the commotion which had disrupted the meeting, he observed Averette participating with the sergeant at arms in the commotion and assumed that because Averette was standing right next to the sergeant at arms, that Averette was part of the sergeant at arms' staff. Durham learned from others at that meeting that the commotion which had disrupted the meeting was caused by a confrontation between former Secretary-Treasurer Gullo and the sergeant at arms, and concluded that the commotion involved a ''political dispute'' between Gullo and the sergeant at arms. I am of the opinion that because Durham be-

[19] When asked during the hearing whether he made any subsequent telephone calls to Hall, Averette testified he may have made one other call sometime in May or June but had no independent recollection of making such a call.

[20] Because this case presents a dual-motive situation, in analyzing Respondent's motivation, I shall be guided by the Board's decisions in *Wright Line*, 251 NLRB 1083 (1980), and *Limestone Apparel Corp.*, 255 NLRB 722 (1981). See, e.g., *Painters Local 1140 (Harmon Contract)*, 292 NLRB 723 (1989); *Toledo World Terminals*, 289 NLRB 670 (1988); *Auto Workers Local 2017 (Federal Mogul)*, 283 NLRB 799 fn. 1 (1987); *Plasterers Local 121*, 264 NLRB 192, 193 (1982). I also note that counsel for the General Counsel makes no contention that even assuming the absence of discriminatory intent, that Respondent violated the Act by departing from established hiring hall procedures when it insisted that the Employer agree to use the list of employees in employing casual dockworkers when the hiring hall was closed, or otherwise violated its duty of fair representation in connection with the institution and maintenance of that list (Tr. 14–15, 403; see also G.C. Br. pp. 36–37).

lieved Averette was part of the sergeant at arms' staff, he also believed that Averette, like the sergeant at arms, was actively involved in the political dispute; that Averette, like the sergeant at arms, was opposed to Gullo's election and supported Sandoval, Brooke and Haas in their bids for reelection. This inference is bolstered by the fact that when Durham on February 14 confronted Averette and angrily questioned him about his presence at the meeting, that Averette abruptly told him it was none of his business and stated that he was there as President Sandoval's guest. Moreover, if there is any doubt that Durham believed Averette had joined Respondent for the purpose of actively supporting Sandoval, Brooke, and Haas in their bids for reelection, the doubt was removed by dispatcher Blue's March 13 admission to Averette. On that day, immediately after Averette had joined the Respondent, Blue told him that Blue was opposed to the reelection of Sandoval and Brooke and criticized Sandoval's performance as president, and informed Averette that the members of Respondent who supported the candidates campaigning to defeat Sandoval and Brooke, which included Durham, thought that Averette had joined Respondent to act as an ''enforcer'' for Brooke and Brooke's group. It is for all the above reasons that I find Durham believed Averette had joined the Respondent with the intention of actively supporting Sandoval, Brooke, and Haas in their bids for reelection.

It was immediately after questioning Sandoval about Averette's employment with the Employer and about his membership in Respondent, and objecting to his employment by the Employer and his membership in Respondent, that Durham requested and the Employer agreed that if the Employer hired casual dockworkers when the Respondent's hiring hall was closed, that the Employer would use a list of names provided by Durham. As described in detail supra, during the last week of March Durham questioned Sandoval about Averette's employment with the Employer and about his membership in Respondent and informed Sandoval he thought the Employer should not continue to employ Averette and stated that Averette was not the type of a person Respondent wanted as a member. It was at this time, after Sandoval indicated he disagreed with Durham's assessment of Averette, that Durham handed to Sandoval a list of names and phone numbers, which did not include Averette's name, and told Sandoval to take the list to the Employer for the Employer to use when hiring casual dockworkers when the Respondent's hiring hall was closed.

Also relevant in evaluating Durham's motivation for requesting that when the Employer needed to hire casual dockworkers when Respondent's hiring hall was closed, that it hire them from the list of names provided by Durham, is the fact that Durham was unable to settle on a reason for omitting Averette's name from the list. Thus, during the last week of March, when Durham gave the list of names to Sandoval to give to the Employer, he explained to Sandoval that Averette's name was not on the list because of his lack of seniority. However, on April 3 when Durham explained the list to Averette and Secretary-Treasurer Haas, he failed to mention it was Averette's lack of seniority that had kept his name from being included on the list, but simply explained that the list had been put together by members of the Respondent who had registered for work at the hiring hall who had indicated they were willing to be called at home by the Employer when the hiring hall was closed, and when asked by Haas if he had any objection to Averette's name being added to the list, replied he had no objection whatsoever. Durham did not mention to Haas or Averette that Averette's lack of seniority precluded him from being included on the list. Lastly, when he testified in this proceeding about the origin of the list and the contemplated use of the list, Durham failed to mention that seniority had been a factor in determining who, among Respondent's members, were eligible to be included on the list. Rather he testified that those members of Respondent registered at Respondent's hiring hall, who had complained about not being called for casual dock work by the Employer and who indicated they were available for work when the hiring hall was closed, had placed their names on the list, regardless of seniority. In other words, as described supra, the record reveals that Durham proffered different and shifting reasons to justify the omission of Averette's name from the list, and that one of those reasons—Averette's lack of seniority—was false. These circumstances lend strong support to the inference that Durham was discriminatorily motivated when he requested that the Employer agree to use Durham's list of names and telephone numbers, if the Employer needed to employ casual dockworkers when the Respondent's hiring hall was closed.

Likewise, Durham's failure to add Averette's name to the list of names and telephone numbers after having told Averette he had no objection to this being done, lends further support to the inference that Durham was discriminatorily motivated when he had Sandoval transmit to the Employer the list of names for the Employer to use in employing casuals when Respondent's hiring hall was closed. In this regard, as described supra, in response to Averette's complaint that Durham had caused the Employer to terminate his employment, Durham on April 3 told Averette and Secretary-Treasurer Haas that he had nothing against Averette's name being added to the list of names he had provided for the Employer when hiring casual dockworkers when the hiring hall was closed. Averette responded by indicating that this would remedy his complaint because with his name on the list he felt that the Employer would continue to employ him as it had done in the past. However, Respondent never notified the Employer it could add Averette's name to the list nor did it ever transmit a revised list to the Employer which included Averette's name. Durham testified that his reason for not adding Averette's name to the list was that he assumed Haas would do it, because Averette had expressed his complaint to Haas and that Haas, even though he was the Respondent's chief executive officer, ''got involved in everything.'' I reject Durham's explanation because his testimonial demeanor was poor and his explanation, when viewed in context, seems incredible because: Durham was the person employed by Respondent who was responsible for policing Respondent's contract with the Employer and it was his job to attempt to resolve the grievances of the employees employed by the Employer and it was Durham who had decided to present the Employer with the list of names to use when it employed casual dockworkers when the hiring hall was closed and it was Durham who made sure that the Employer used the list; Haas, on the other hand, had nothing to do with the preparation of the list or the decision to transmit the list to the Employer and knew nothing whatsoever about the list or its purpose prior to Averette's April 3 complaint. In view of these

circumstances, it does not seem plausible that Durham would have believed that Respondent's Chief Executive Officer would have performed the ministerial task of informing the Employer that Respondent had no objection to its adding Averette to the list of names provided to it by Durham, inasmuch as this would have been a job normally performed by Durham as part of his usual duties. This and the lack of evidence that in the past Haas had involved himself in merely ministerial matters which his subordinate business agents would normally be expected to perform, persuades me that Durham's explanation was not credible.[21] Rather, I am persuaded that Durham's failure to add Averette's name to the list, after having told Averette he had no objection to doing so, supports the inference he was discriminatorily motivated when he gave Sandoval the list for the Employer to use to employ casual dockworkers when the Respondent's hiring hall was closed.

Lastly, the inference that Respondent was unlawfully motivated when Durham decided to have the Employer use his list of names and telephone numbers to call casual dockworkers when the hiring hall was closed, is further supported by the shifting and contradictory reasons advanced by Respondent for preparing the list and having the Employer use it. Initially, Durham gave the following testimony (Tr. 273–276): He transmitted the list to the Employer through Sandoval because of the complaints that the Employer was violating the hiring provision of the Respondent's contract with the Employer by hiring people off of the street for the Sunday–Monday shift, instead of hiring sufficient casuals on Friday from the hiring hall; these complaints were expressed to Durham on behalf of the complainants by dispatcher Blue and then directly to Durham by the complainants themselves; and, the names and telephone numbers on the list were of the members registered for work at the hiring hall who had been complaining to Blue and Durham about the Respondent's practice of not calling them to work for the Sunday–Monday shift. However, later when asked why he submitted the list of names and telephone numbers to the Employer, Durham gave an entirely different reason; he testified that his reason for submitting the list to the Employer was as follows (Tr. 294): ''because the operations manager at Consolidated had been complaining to me that he could not get people to fill those shifts [referring to the Sunday–Monday shift]. He was complaining he could not get people out of the hall and/or off the street. So we indicated to him that would provide a list as a courtesy for him to utilize.'' Not only did Durham give shifting and contradictory reasons to justify the preparation and the submission of the list of names and telephone numbers to the Employer, but dispatcher Blue, who, supposedly prepared the list, gave yet another reason why Respondent prepared it and submitted it to the Employer. Blue's reason contradicted both of Durham's reasons. For, as described supra, Blue told Operations Supervisor Hall that the list had been mistakenly sent by Respondent to the Employer, that it had not been prepared for the Employer's use, but was prepared for the use of other employers who had the practice of continually employing persons who were not members of the Respondent, for casual dock work when the Respondent's hiring hall was closed.

Considering Durham was opposed to the reelection of Sandoval, Brooke, and Haas, and believed Averette had joined Respondent with the intention of actively supporting them in their bids for reelection; considering it was immediately following Durham's interrogation of Sandoval about Averette's employment by the Employer and his membership in the Respondent, and immediately following Durham's expressed objection to Averette's employment and membership, that Durham gave Sandoval the list of names and telephone numbers to transmit to the Employer to use to hire casual dockworkers when the Respondent's hiring hall was closed; considering the different and shifting reasons advanced by Durham for the omission of Averette's name from the list; considering that one of those reasons was false; considering Durham's failure to add Averette's name to the list after having assured Averette and Haas that he had no objection to this being done; and, considering the shifting and contradictory reasons advanced by the Respondent for preparing and submitting the list to the Employer; I find the General Counsel has established that in deciding to have the Employer use the list of names to employ casual dockworkers when Respondent's hiring hall was closed and in causing the Employer to terminate and refuse to reemploy Averette because his name was not on the list, that Durham was motivated by his belief that Averette had joined the Respondent with the intention of actively supporting the reelection of Brooke, Sandoval, and Haas, rather than Durham and the candidates whom Durham supported.

In reaching this conclusion I have considered that Durham did not know Averette's identity on February 14 when he confronted Averette at the Respondent's membership meeting. However, I am persuaded that by Durham's late March conversation with Sandoval about Averette's union membership and employment with the Employer, that Durham had learned that Averette and the stranger he observed and confronted at the February 14 meeting were one and the same and that Marty Franklin and Averette were one and the same. I reject Durham's testimony that he did not identify Averette until the afternoon of April 3, when he met with him in Haas' office. Durham's testimonial demeanor was poor. I also find it incredible that after being abruptly told by Averette to mind his own business, when Durham angrily questioned Averette at the February 14 membership meeting, that Durham did not investigate until he learned his identity. That it is reasonable to infer he conducted such an investigation is warranted by the fact that, as far as Durham was concerned: a complete stranger had told Durham to mind his own business and told Durham he was at the meeting as President Sandoval's guest; this stranger had involved himself in a political dispute which had disrupted the meeting; and, this stranger had no business even being at the meeting since he was not a member of Respondent. Moreover, contrary to Durham's testimony, the record reveals Durham had definitely learned of Averette's identity by late March, when, as I have found supra, he questioned Sandoval about Averette's union membership and employment with the Employer and stated he did not feel Averette was the type of person Respondent should accept into membership. Lastly, as shown by dispatcher Blue's March 13 comments to Averette, it was apparently a commonly held belief by Blue, Durham,

[21] The sole evidence that it was Haas' habit to perform duties which his business agents would ordinarily have been expected to perform is Durham's testimony that Haas ''got involved in everything.'' Durham offered no specifics to support this conclusion. In view of this and his poor testimonial demeanor I reject this testimony.

and other members of Respondent who opposed the reelection of Sandoval, Brooke, and Haas, that Averette had joined the Respondent in order to actively campaign for their reelection. In this respect I also note that Blue, an admitted agent of Respondent, together with Durham was responsible for the Respondent providing the list of names and telephone numbers to the Employer, and that Blue knew Averette and Marty Franklin were the same person because while Averette on March 13 introduced himself to Blue as Marty Franklin, he registered for work on Blue's hiring hall register using his legal name. It is for all the foregoing reasons that I reject Durham's testimony that it was not until the afternoon of April 3 that he identified Averette. Rather, I find that by the last week of March Durham knew Averette was the stranger he had spoken to at the February 14 meeting and that he was socially using the name of Marty Franklin.

Having concluded that the General Counsel has established that Respondent caused the Employer to terminate Averette's employment on April 3 and thereafter caused the Employer to refuse to reemploy him, and having also concluded that the General Counsel has made a prima facie showing that Respondent engaged in this conduct because of Business Agent Durham's belief that Averette was actively supporting the reelection of candidates for union office that Durham opposed, the remaining question for decision is whether Respondent established it would have caused the Employer to terminate and refuse to reemploy Averette even absent Durham's belief that Averette was supporting candidates for union office whom Durham opposed. I find, for the reasons below, that Respondent failed to rebut the General Counsel's prima facie case.

Respondent contends that even absent Durham's belief that Averette supported candidates for union office whom Durham opposed, Durham would have still complained to the Employer about Averette's employment because Durham believed that the Employer's employment of Averette, and the other casual dockworkers whom it employed on the Sunday–Monday shift when the hiring hall was closed, violated the hiring provision of the Respondent's collective-bargaining contract with the Employer. In support of this contention Respondent relies entirely on the testimony of Durham which, in all significant respects, was uncorroborated.[22] Durham testified that his submission of the list of names and telephone numbers to the Employer to use for the employment of casual dockworkers when the Respondent's hiring hall was closed had nothing to do with the Employer's termination and refusal to reemploy Averette, because the list was given to the Employer several weeks before Averette went to work for the Employer and the Employer was not obligated to use the list inasmuch as it was provided by Durham just as a courtesy. Durham further testified that prior to Friday, March 31, Joe Balteria, a member of Respondent who was registered for dock work at the Respondent's hiring hall, complained to him on more than one occasion that the Employer, instead of using the hiring hall to employ casual dockworkers, was hiring them directly off the street. According to Durham, since Balteria was not able to supply the names of any of the casual dockworkers whom the Employer was hiring directly, Durham refused to investigate his complaints but told him that when he was able to furnish Durham the names of the persons whom the Employer was hiring directly, that he would then investigate. Durham testified that subsequently, on Friday, March 31, Balteria came to him and identified by name Earl Averette, Thornton Ohshaski, and Gene Lopez as having been hired directly off the street by the Employer to work on the Sunday–Monday shift, rather than Balteria and others who were registered for casual dock work at the Respondent's hiring hall, and that Balteria asked Durham to file a grievance on his behalf against the Employer. Durham testified it was at this point that he decided to investigate Balteria's complaint and decided to do so because Balteria had given him the names of the persons whom the Employer had hired directly off the street to perform casual dock work on the Sunday–Monday shift. Durham further testified that because of this he no longer believed Operations Manager Sisneros' explanation for the Employer's practice of hiring so many persons off the street for the Sunday–Monday shift.

Durham's account of what he did after deciding on Friday, March 31, to investigate Balteria's complaint, follows: On Monday, April 3, on his way to work, he visited the Employer's terminal and looked at the employees' timecards and, in doing so, discovered that, as Balteria had stated, Averette, Ohshaski, and Lopez were at that time employed as casual dockworkers on the Sunday–Monday shift, even though they had not been hired through the Respondent's hiring hall; Durham left the Employer's terminal on April 3 and went to Respondent's hiring hall where his check of the hiring hall records revealed that on Friday, March 31, the Employer had asked the dispatcher to refer only 1 casual dockworker for the Sunday–Monday shift, while asking for the referral of 13 extra truckdrivers for the morning of Monday, April 3. Durham testified he concluded that if the Employer knew on Friday it would need 13 extra truckdrivers to make deliveries on Monday, it must have also known on Friday that it would need more than one extra casual dockworker for the Sunday–Monday shift to prepare the freight for the Monday deliveries, and because of this Durham testified he felt that the Employer had waited until the hiring hall was closed to hire the 3 additional dockworkers in order to get around the contractual hiring provision which required it to hire through the hiring hall when it was open. Lastly, as I have found supra, on April 3 at approximately 8:30 a.m. Durham telephoned Terminal Manager John Paiva and, according to Durham's testimony, told Paiva that in response to complaints that the Employer was not hiring casual dockworkers from the Respondent's hiring hall, but was hiring them directly, he had visited the Employer's terminal that morning and discovered this was true and that he intended to file a grievance against the Employer on behalf of the complainants because he believed that the Employer was purposely attempting to circumvent the hiring provision of the parties' contract. Durham also testified that, as an afterthought, he also mentioned to Paiva that when Respondent had previously experienced this problem with the Employer, that as a courtesy Sandoval had given the Employer's operations manager a list of the names of persons who were willing to be called for work by the Employer at their homes. Durham testified that he told Paiva the Respondent had asked that whenever the Employer need-

[22] I have not, as urged by counsel for the General Counsel, drawn an adverse inference from Respondent's failure to call dispatcher Blue as a witness to corroborate Durham's testimony. Since Blue's employment with Respondent terminated several weeks prior to the hearing in this case, there is a serious question of whether it would be appropriate for me to draw such an inference.

ed additional casual dockworkers which the hiring hall could not supply, that the Employer use this list and that Durham felt the Employer was now trying to circumvent the hiring hall by not using the list.

I reject Respondent's contention that even absent Durham's belief that Averette supported candidates for union office whom Durham opposed, Durham would have still complained to the Employer about Averette's employment because Durham believed that the Employer's hire of Averette, and the other casual dockworkers whom it hired for the Sunday–Monday shift when the hiring hall was closed, violated the hiring provision of the Respondent's contract with the Employer. My reasons for rejecting this contention are as follows.

Initially I note that, as I have previously indicated when evaluating Durham's testimony when it conflicted with the testimony of other witnesses, his testimonial demeanor was generally poor.

Durham's testimony that it was several weeks prior to April 3 that he gave the list of names and telephone numbers to Sandoval to give to the Employer has been rejected previously. Also incredible is his testimony that the list was given to the Employer as a courtesy and that the Employer was not required by Durham to use the list to hire extra casual dockworkers when the Respondent's hiring hall was closed. This testimony does not square with Durham's further testimony that the reason he gave the list to the Employer was because the hiring hall registrants had complained to dispatcher Blue and to Durham that the Employer was violating the governing collective-bargaining contract by hiring people directly off the street rather than using the hiring hall to hire the complainants. It seems to me that the only way that providing the list of the complainants' names to the Employer would remedy their complaint was if the Employer was required by Durham to use the list when hiring casual dockworkers when the hiring hall was closed. For Durham to have allowed the Employer to use or not to use the list at its discretion would not have remedied the hiring hall registrants' complaint that the Employer was employing casuals whom it hired directly, rather than employing hiring hall registrants to work on the Sunday–Monday workshift.

The unbelievable nature of Durham's testimony that he provided the Employer with the list as a courtesy, to use or not to use at its discretion, and told this to Operations Manager Sisneros at the time the list was provided to the Employer, is further shown by the following. Late in March, when Durham gave the list to Sandoval to give to the Employer, Durham did not say that the list was being provided to the Employer as a courtesy and that the Employer was not required to use the list. Rather, as I have found supra, Durham informed Sandoval that the Employer should call the persons named on the list if it needed additional casual dockworkers when the hiring hall was closed. Subsequently, on April 3, as I have found supra, Durham telephoned Terminal Manager Paiva and complained to him that the Employer on that date was employing three casual dockworkers rather than those named on the list, and explained to Paiva that the Employer was obligated to first employ the persons named on the list which had been given to the Employer by Respondent. Thereafter on August 29, as I have found supra, when Paiva complained to Durham that the Employer was not having much success in using the list of names, and asked for a new or revised list, Durham did not indicate that the Employer was not obligated to use the list. It was not until December 4, shortly before the hearing in this case, as described supra, that Durham by letter to Paiva specifically rescinded the list and abrogated the parties' agreement that the Employer would use the list to hire casual dockworkers when the hiring hall was closed. Durham's December 4 letter did not expressly or by implication state that when Durham provided the list to the Employer, that Durham had told anyone from the Employer that the list was being provided as a courtesy and could be used or not used at the Employer's discretion.

I have previously rejected Durham's testimony that the principal thrust of his April 3 conversation with Paiva was that he had discovered that the Employer, in violation of its collective-bargaining contract with Respondent, had hired casual dockworkers directly off the street, rather than from Respondent's hiring hall, and that in view of this discovery he intended to file a grievance against the Employer, and that it was only as an afterthought that he mentioned to Paiva that the Respondent had previously provided a list of names for the Employer to use in hiring casual dockworkers when the hiring hall was closed. Rather, as I have found supra, the principal thrust of Durham's April 3 conversation with Paiva was Durham's statement that he intended to file a grievance against the Employer because on its Sunday–Monday shift of April 2–3 the Employer had employed three casual dockworkers whose names were not on the list provided to the Employer by Durham the previous week, and that Durham explained to Paiva that the Employer was required to first employ persons named on that list. This finding is further supported by the timing of the conversation, coming as it did hard on the heels of the Employer's agreement with the Respondent to use the list of names provided by Durham to hire casual dockworkers when the Respondent's hiring hall was closed. It is also supported by the evidence that despite the fact that Balteria and other hiring hall registrants had complained to Durham several weeks previously about not being hired by the Employer because the Employer was hiring casual dockworkers directly when the hiring hall was closed, it was only immediately after the Employer agreed to use the list of names provided by Durham to hire casuals when the hiring hall was closed, that Durham investigated their complaints. Durham's testimony that he failed to investigate these complaints prior to April 3 because the complainants were unable to identify the names of the casual dockworkers hired directly by the Employer, does not seem credible. Durham did not explain why his lack of knowledge of the identities of the casual dockworkers hired by the Employer directly, deterred him from investigating the complaints expressed by Balteria and the other complainants. Nor is such a reason readily apparent. Quite the opposite, it is readily apparent that by simply visiting the Employer's premises early on a Monday morning, as he did on April 3, Durham at any time could have conducted the same type of investigation as he conducted on April 3, without having advance knowledge of the identities of the casuals whom were being directly employed by the Employer.[23] It was only immediately after the

[23] I also note that the record reveals that it is highly implausible that, as Durham testified, his April 3 investigation was triggered by the ability of Balteria to identify the three casuals whom the Employer had hired directly off the street to work on the Sunday–Monday shift of April 2–3. Durham

Employer entered into and breached its agreement with the Respondent to use Durham's list or names, an agreement that was motivated by Durham's belief that Averette was engaged in protected concerted activity, that Durham complained to the Employer about Averette's employment.

Based on the foregoing I find that Respondent has failed to establish that even absent Durham's belief that Averette supported candidates for union office whom Durham opposed, that Durham would have complained to the Employer about Averette's employment because of a good-faith belief that his employment violated the hiring hall provision of the parties' collective-bargaining contract. Rather I am persuaded that this contention was advanced as a pretext to cover up Durham's real reason for complaining about Averette's employment.

In finding that the General Counsel established that in providing the Employer with a list of names and telephone numbers to use to hire casual dockworkers when Respondent's hiring hall was closed, and in causing the Employer to terminate and to refuse to reemploy Averette because his name was not on the list, that Respondent was discriminatorily motivated, and in also finding that Respondent failed to establish it would have complained to the Respondent about Averette's employment, even absent Durham's belief that Averette was engaged in protected concerted activity, I considered that the list of names and telephone numbers omitted not only Averette's name, but the names of other casual dockworkers whom the Employer had employed previously on the Sunday–Monday shift, including the names of Ohshaski and Lopez whom with Averette the Respondent specifically requested that the Employer terminate on April 3. However, considering all the circumstances of this case, I am persuaded that the omission of Ohshaski's and Lopez' names from the list, as well as the omission of the names of others whom the Employer had previously employed on the Sunday–Monday shift, was simply an incidental affect of Respondent's discriminatory objective in providing the list of names, which was to cause the Employer to cease employing Averette because of Durham's belief that he was supporting candidates whom Durham was opposing in an intraunion election being conducted by the Respondent. In other words, the Respondent's omission of Lopez' and Ohshaski's names from the list it provided to the Employer, thus causing the Employer to discharge and cease employing them, is analogous to those situations where employers have been found to have discriminated against employees who have not engaged in union or protected concerted activity in order to provide an aura of legitimacy for the unlawful termination of another employee who had been engaged in such activity.

CONCLUSION OF LAW

By causing the Employer to terminate Earl Averette on April 3, 1989, and to subsequently fail and refuse to reemploy him because of Respondent's belief that Averette was engaged in activity protected by Section 7 of the Act, the Respondent has engaged in unfair labor practices affecting commence within the meaning of Section 8(b)(2) and (1)(A) of the Act.

failed to explain how Balteria on Friday, March 31, could have known the names of these persons, when it was not until Sunday, April 2, that they were hired.

THE REMEDY

Having found that Respondent violated Section 8(b)(2) and (1)(A) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

I shall recommend that Respondent make Averette whole for any loss of earnings that he may have suffered because on April 3, 1989, Respondent unlawfully caused the Employer to terminate his employment and thereafter unlawfully caused the Employer to fail and refuse to reemploy him on its Sunday–Monday workshift. The loss of earnings shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Respondent's backpay liability was not tolled by Business Agent Durham's December 4, 1989 letter to Terminal Manager Paiva. It was not tolled because there is no evidence that Respondent sent a copy of that letter to Averette or otherwise notified Averette that Respondent did not object to his being employed directly by the Employer for the Sunday–Monday shift when the Respondent's hiring hall was closed. The necessity for the remedial order to require Respondent to notify Averette that it did not object to the Employer hiring him directly for employment on the Sunday–Monday shift when the hiring hall was closed is readily apparent because, as I have found supra, but for Respondent's unfair labor practices Averette would have continued to follow his usual procedure of telephoning Operations Supervisor Hall on Sunday to inquire about the availability of work on the Sunday–Monday shift, and therefore would have continued to secure employment on that shift even though Hall subsequent to April 9 mislaid his telephone number and for that reason was unable to call him for work when Hall exhausted the list of names provided by Respondent. In this regard, I note that in determining whether Hall's loss of Averette's telephone number would have resulted in Averette's loss of employment, regardless of Respondent's unfair labor practices, any uncertainty must be resolved against the Respondent because Respondent's unlawful conduct caused the uncertainty. See, e.g., *Kawasaki Motors v. NLRB*, 850 F.2d 524 (9th Cir. 1988). Here, absent Respondent's unfair labor practices, it is more than likely that Averette would have continued his past practice of not waiting for Hall to telephone him on Sunday but would have continued to call Hall each Sunday to inquire about the availability of employment on the Sunday–Monday shift.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, Local Union No. 287, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, San Jose, California, its officers, representatives, and agents, shall

1. Cease and desist from

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Causing or attempting to cause the Employer to terminate or refuse to employ Earl Averette, or any other employee, because it believes they have engaged in activity protected by Section 7 of the Act.

(b) In any like or related manner restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Earl Averette whole for any loss of earnings he may have suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Notify the Employer, in writing, with a copy furnished to Earl Averette, that it has no objection to Averette's employment and request the Employer to reemploy him, as needed, on the Sunday–Monday shift.

(c) Remove from its files, and ask the Employer to remove from the Employer's files, any reference to the unlawful termination and unlawful refusal to reemploy Averette and notify Averette, in writing, that it has done so and will not use against him the unlawful termination and unlawful refusal to reemploy him.

(d) Post at its business office copies of the attached notice marked ''Appendix.''[25] Copies of the notice on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Sign and return to the Regional Director sufficient copies of the notice for posting by the Employer at its San Jose, California terminal, if willing, at all places where notices to employees are customarily posted.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT cause or attempt to cause Consolidated Freightways to terminate or refuse to employ Earl Averette, or any other employee, because we believe they are engaging in activity protected by Section 7 of the National Labor Relations Act.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Earl Averette whole for any loss of earnings he may have suffered as a result of the discrimination against him, plus interest.

WE WILL notify Consolidated Freightways, in writing, with a copy furnished to Earl Averette, that we have no objection to his reemployment and WE WILL request Consolidated Freightways to reemploy him, as needed, on the Sunday–Monday workshift.

We will remove from our files, and ask Consolidated Freightways to remove from its files, any reference to Averette's unlawful termination and the subsequent unlawful refusal to reemploy him and WE WILL notify Averette, in writing, that we have done so and that the discharge and refusal to reemploy him will not be used against him in any way.

LOCAL UNION NO. 287, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL–CIO